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Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

13955-E

JRT
TAH

SUSAN E. MAXFIELD, as Guardian ad Litem for LAURIE ANN MAXFIELD,

Plaintiff and Appellant,

vs.

KENNETH O. FISHLER,

Defendant and Respondent.

Case No.
13955

RESPONDENT'S BRIEF

Appeal from the Order of Dismissal of the
District Court of Salt Lake County,
Honorable Bryant H. Croft, Judge

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TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	2
ARGUMENT —	
POINT I: THE TRIAL COURT'S DISMISSAL FOR FAILURE TO PROSECUTE IS PRE- SUMED CORRECT AND SHOULD BE AF- FIRMED UNLESS AN ABUSE OF DISCRE- TION IS SHOWN	7
POINT II: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DIS- MISSED PLAINTIFF'S CLAIM FOR FAIL- URE TO PROSECUTE	9
CONCLUSION	17

CASES CITED

Baker v. Sojka, 74 N.M. 587, 396 P.2d 195 (1964).....	16, 17
Barber v. Calder, 522 P.2d 700 (Utah 1974)	8
Brasher Motor & Finance Co. v. Brown, 23 Utah 2d 247, 461 P.2d 464 (1969).....	7, 17
Bunting Tractor Co. Inc. v. Emmett D. Ford Contractors, Inc., 2 Utah 2d 275, 272 P.2d 191 (1954)	15

TABLE OF CONTENTS — (Continued)

	Page
Evans v. Butters, 16 Utah 2d 272, 399 P.2d 210 (1965)	8, 9
Huggins v. Hicken, 6 Utah 2d 322, 310 P.2d 523 (1957)	12
In Re Josephson, 218 F.2d 174, 182 (1st Cir. 1954)	10
Marsh v. Pemberton, 10 Utah 2d 40, 347 P.2d 1108 (1959)	12
Martin v. Stevens, 121 Utah 484, 243 P.2d 747 (1952)	8, 9
McKean v. Mountain View Memorial Estates, Inc., 17 Utah 2d 323, 411 P.2d 129 (1966)	15
Reed v. First National Bank, 194 Or. 45, 241 P.2d 109 (1952)	7-8
States Steamship Co. v. Philippine Air Lines, 426 F.2d 803 (9th Cir. 1970)	10
Tucker Realty, Inc. v. Nunley, 16 Utah 2d 97, 396 P.2d 410 (1964)	9

STATUTES CITED

Rule 12(j), Utah Rules of Civil Procedure	3
Rule 40(b), Utah Rules of Civil Procedure	13
Rule 41(b), Utah Rules of Civil Procedure	7, 8, 10, 11

IN THE SUPREME COURT OF THE STATE OF UTAH

SUSAN E. MAXFIELD, as Guardian ad Litem for LAURIE ANN MAXFIELD,

Plaintiff and Appellant,

vs.

KENNETH O. FISHLER,

Defendant and Respondent.

Case No.

13955

RESPONDENT'S BRIEF

NATURE OF THE CASE

This is a medical malpractice action arising out of the alleged failure of the respondent physician to discover and treat a physical ailment of the appellant infant.

DISPOSITION IN LOWER COURT

The District Court of Salt Lake County, Honorable Bryant H. Croft, presiding, dismissed the appellant's claim for failure to prosecute.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment below.

STATEMENT OF FACTS

Appellant has failed to state important facts relevant to this appeal and a more complete and accurate statement is therefore necessary. The parties will hereinafter be designated as they appeared in the trial court.

The facts relating to the merits of the plaintiff's claim are not in issue on this appeal and can be briefly summarized. The plaintiff's child, Laurie Ann Maxfield, was born under the care of an obstetrician on December 10, 1967, in the Latter-day Saints Hospital in Salt Lake City. [R. 25] Laurie's mother arranged for the defendant pediatrician, Dr. Kenneth Fishler, to begin caring for the infant after her birth and Dr. Fishler examined her on December 10, 1967. [R. 28]. The initial examination revealed nothing remarkable and, during the next three years, Dr. Fishler occasionally examined the child and treated her for various ailments. [R. 28].

In August, 1970, the plaintiff informed Dr. Fishler that the child was having to urinate with unusual frequency. Dr. Fishler examined a urine specimen which was found to be normal, but, when the problem persisted, he referred the plaintiff to a urologist, Dr. Paul Clark. Dr. Clark diagnosed a partially constricted urethra and admitted the child to the Primary Children's Hospital for a urethrotomy. At the time of surgery, Dr. Clark observed that the child's labia were fused together and only a small pinpoint opening allowed urine to pass. [R. 21]. A labiaplasty was performed

and the dilation procedure of the urethra was then completed without complication. [R. 21].

On October 18, 1972, the plaintiff filed a complaint alleging that Dr. Fishler was negligent in failing to observe the adherent labia and that the delay in correcting the condition caused the subsequent urethral hypoplasia, as well as other physical and emotional damage. [R. 110]. The complaint was served on October 23, 1972. [R. 106].

On November 13, 1972, the defendant answered the complaint and, since the plaintiff resided in Arizona, the defendant filed a notice requiring security for costs pursuant to Rule 12(j), Utah Rules of Civil Procedure. [R. 101-103]. The plaintiff failed to file a bond within one month as required by Rule 12(j) and, on December 26, 1972, the defendant moved for a dismissal. [R. 99-100]. The court ordered the plaintiff to file a bond by January 3, 1973, but, subject to compliance with its order, the court denied defendant's motion to dismiss. [R. 98]. The record contains no evidence or indication that the plaintiff filed a security for costs in accordance with the court's order.

On January 9, 1973, the defendant filed a notice for the taking of the plaintiff's deposition. [R. 96]. Mr. Fullmer objected to the date of the scheduled deposition and, at his request, the deposition was rescheduled and taken on January 25, 1973. [R. 93-95].

On March 14, 1974, after the plaintiff had failed to take any action on the case for more than a year, the

defendant submitted interrogatories and requested a trial setting in order to move the case forward. [R. 87, 90-92]. Mr. Fullmer objected to the interrogatories on the grounds that he had insufficient time in which to answer and objected to the request for a trial setting on the grounds that discovery had not been completed. [R. 88-89]. Neither objection was noticed for hearing and a trial date was set for October 29, 1974. [R. 87.5]. The plaintiff answered the interrogatories two months later on May 16, 1974, although the answers were not filed until October 24, 1974. [R. 72-73].

Supplemental interrogatories were submitted to the plaintiff on May 20, 1974. [R. 84-86]. After waiting nearly five months for the plaintiff to supply answers, defendant moved for an order compelling discovery on October 18, 1974, eleven days prior to trial. [R. 77]. Mr. Fullmer failed to appear at the hearing and the court ordered that answers to the supplemental interrogatories be filed no later than October 24, 1974, or the plaintiff's claim would be dismissed. [R. 74]. The plaintiff submitted answers on October 24, 1974. [R. 69-71].

On the morning of trial, the plaintiff's counsel and the infant's parents were present, as were the defendant and his attorney. [R. 13]. Just prior to commencement of the jury trial, Mr. Fullmer requested a conference with the Court and counsel in chambers. [R. 13]. Plaintiff's counsel informed the court that he had hoped to present medical evidence concerning the condition and care of the child through the testimony of the urologist,

who had treated her four years earlier. [R. 13]. Plaintiff's counsel had attempted to serve Dr. Clark with a subpoena four days prior to the trial, but Dr. Clark was then out of town and would not return in time to testify. [R. 13]. Plaintiff's counsel conceded that he had not contacted any other medical witnesses and none was present for trial to testify concerning the medical community's standard of care for treatment in such cases and the child's current condition and prognosis. [R. 13]. The plaintiff's counsel therefore moved for a continuance. [R. 13].

Upon inquiry by the court, plaintiff's counsel admitted that he had never contacted Dr. Clark to arrange his testimony nor had he notified him of the scheduled trial date. [R. 14]. He had also made no effort to secure the attendance of physicians in Arizona who had treated the child. [R. 14].

The court asked plaintiff's counsel for an offer of proof of the testimony he expected Dr. Clark to give. Plaintiff's counsel conceded that Dr. Clark had previously expressed the opinion to him that Dr. Fishler had done nothing wrong, but claimed the plaintiff would testify that Dr. Clark had made contrary statements to her after the corrective surgery. [R. 14]. Plaintiff's counsel also informed the court that the child's parents were prepared to testify to the damage they had personally suffered by having to render additional care to the child. [R. 14]. When the court informed plaintiff's counsel that the child's parents were not parties to the lawsuit, he then moved for leave to amend his complaint.

[R. 14]. Plaintiff's counsel made no other offer of proof to support his motion for a continuance.

The court denied plaintiff's motion to amend the complaint to add additional parties because the motion, made on the morning of trial, came too late. [R. 14]. The court also determined that the plaintiff's counsel had failed to demonstrate due diligence and had failed to offer sufficient proof to justify a postponement of the trial and, therefore, the court denied plaintiff's motion for a continuance. [R. 15].

Since plaintiff's counsel had failed to secure the attendance of any expert to testify on the plaintiff's behalf, the plaintiff could not present evidence needed to prevail and, therefore, could not proceed with the trial. Even though the defendant was fully prepared to proceed, since plaintiff's counsel had failed to exercise due diligence in preparing for the trial and had failed to take any reasonable measures to bring the case to a conclusion during the pendency of the case, the defendant moved the court for an order dismissing plaintiff's claim for failure to prosecute. [R. 14].

The court found that the files and records of the case indicated that plaintiff's counsel had undertaken no discovery by deposition, interrogatories or otherwise, that he had been consistently dilatory in responding to discovery requests of the defendant and that he had failed to make reasonable efforts to prepare for trial to the detriment of the defendant who was ready to proceed. [R. 13-14]. Based on these findings, the court

dismissed the plaintiff's claim for failure to prosecute in accordance with Rule 41(b), Utah Rules of Civil Procedure. [R. 15].

ARGUMENT

POINT I

THE TRIAL COURT'S DISMISSAL FOR FAILURE TO PROSECUTE IS PRESUMED CORRECT AND SHOULD BE AFFIRMED UNLESS AN ABUSE OF DISCRETION IS SHOWN.

The trial court dismissed the plaintiff's claim in accordance with the discretionary authority vested in the trial judge by Rule 41(b), Utah Rules of Civil Procedure. The rule states, in its relevant part:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.

This Court, in harmony with courts throughout the country, recognizes that the trial judge exercising such discretionary power is presumed to have acted reasonably and his decision will not be disturbed unless the record reveals abuse of discretion.

In *Brasher Motor & Finance Co. v. Brown*, 23 Utah 2d 247, 461 P.2d 464 (1969), the trial judge on his own motion dismissed a complaint and counterclaim for failure to prosecute. Quoting the opinion in *Reed v. First National Bank*, 194 Or. 45, 241 P.2d 109 (1952), the Court adopted the following rule:

In dismissing an action for want of prosecution, the court may proceed under the statute, or it may, of its own motion, take action to that end. In acting on its own motion, the court must proceed with judicial discretion. Its ruling will not be disturbed on appeal unless it is manifest from the record that the court's discretion has been abused. 461 P.2d at 464-65. (Emphasis omitted).

The appropriate standard of review in cases of discretionary dismissals was also discussed in the recent case of *Barber v. Calder*, 522 P.2d 700 (Utah 1974). In *Barber*, the trial court granted a default judgment in favor of the plaintiffs because the defendant failed to respond to interrogatories. Conceding that the trial court should exercise discretion liberally in favor of giving parties an opportunity to a hearing on the merits, the Court, nevertheless, correctly held:

In situations where the exercise of discretion is appropriate, considerable weight should be given to the determination of the trial court, whichever way it goes. This is true because due to his close involvement with the parties, the witnesses, and the total circumstances of the case, he is in the best position to judge what the interests of justice require in safeguarding the rights and interests of all parties concerned. 522 P.2d at 702.

Plaintiff cites *Martin v. Stevens*, 121 Utah 484, 243 P.2d 747 (1952) and *Evans v. Butters*, 16 Utah 2d 272, 399 P.2d 210 (1965) in support of the proposition that the Court should appraise a dismissal pursuant to Rule 41(b) in a light most favorable to the losing party. This Court has consistently held to the contrary and the cases plaintiff relies upon are wholly inapplicable

to a dismissal for failure to prosecute. In *Martin and Evans*, the trial court granted a dismissal on the merits because the evidence presented at trial indicated the plaintiffs were contributorily negligent.

In contrast, the trial court in the instant case did not weigh the merits of the plaintiff's claim, but merely exercised discretionary power reserved exclusively to the court. As stated in *Tucker Realty, Inc. v. Nunley*, 16 Utah 2d 97, 396 P.2d 410 (1964), where the Court sustained a dismissal for failing to cooperate in discovery procedures:

Unless it is shown that his action is without support in the record, or is a plain abuse of discretion, it should not be disturbed. 396 P.2d at 412.

Since the trial court's judgment is presumed to be correct, the plaintiff had the burden of establishing an abuse of discretion but has failed to do so.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DISMISSED PLAINTIFF'S CLAIM FOR FAILURE TO PROSECUTE.

While it is the general policy of the Court to favor an adjudication of the merits in each case, the concomitant interests of all parties in proceeding toward a conclusion with reasonable dispatch must be equally protected. The facts of the instant case, viewed in light of precedent, clearly demonstrate that the trial court did not abuse its discretion, but, rather, acted with judicial propriety.

The determination of whether the trial court abused its discretion must, of course, ultimately depend upon the facts of each case. Nevertheless, in *States Steamship Co. v. Philippine Air Lines*, 426 F.2d 803 (9th Cir. 1970), cited with approval in plaintiff's brief, the Court proposed a rule of thumb for judging the exercise of discretion that the defendant offers to this Court for its consideration. Citing the "oft-quoted" phrase of Judge Magruder in *In Re Josephson*, 218 F.2d 174, 182 (1st Cir. 1954), the Court stated:

[T]he exercise of discretion of the trial judge should not be disturbed unless there is "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." 426 F.2d at 804.

The relevant factors suggested for consideration in cases of dismissals under Rule 41(b) were enumerated by the Court as follows:

(1) the appellants' right to a hearing on its claim, (2) the impairment of appellees' defenses presumed from the unreasonable delay, (3) the wholesome policy of the law in favor of the prompt disposition of lawsuits, and (4) the duty of the appellant to proceed with due diligence. *Id.* at 805.

In *States Steamship*, the court affirmed the dismissal of an action because the plaintiff failed for more than 13 months to respond to the defendant's interrogatories. The facts of the case now before this Court, viewed according to the above-cited standard, similarly compel an affirmance of the trial court's decision to dismiss.

Implicit in Rule 41(b) is the duty of the plaintiff to prosecute his case in due course and with reasonable diligence. In the instant case, the plaintiff not only failed to do so, but actually impeded the progress of litigation at every step and, in the end, exposed a fatal lack of preparedness that precluded any attempt to proceed on the day of trial.

The record discloses that after the complaint was filed initiating this action, plaintiff's counsel made no effort whatsoever to obtain evidence establishing a factual basis for the plaintiff's claim. No witnesses, experts or adverse parties were deposed. Plaintiff's counsel did not prepare interrogatories. Indeed, no medical experts were consulted to evaluate the propriety of the defendant's medical care upon which the alleged damages are based. If such experts had been consulted, the claim against this defendant might have been voluntarily dismissed.

In addition to demonstrating the absence of any effort to substantiate the merit of appellant's claim, the record also discloses the plaintiff's resistance to defendant's efforts to move the case forward. The plaintiff refused to file the required undertaking for costs upon the request to do so and an undertaking was filed, if at all, only after a court order was issued. After the defendant deposed the plaintiff's mother, the case remained dormant for a year until the defendant again initiated action by filing interrogatories and a request for a trial setting. Notwithstanding the passage of a year since commencement of the action, the plaintiff

resisted both efforts to encourage progress of the litigation. Plaintiff's counsel filed objections, but failed to proceed even on his own objections and never requested a hearing to resolve them. The answers to interrogatories were not filed within the time required by the rules. Supplemental interrogatories remained unanswered for nearly five months until the defendant was forced to seek an order compelling discovery six days prior to trial.

The record thus demonstrates that plaintiff failed within the time required by the Rules of Procedure to respond to each and every discovery and procedural effort put forth by the defendant.

On the morning of trial, the past neglect in failing to prepare and prosecute the plaintiff's claim was fully exposed. The plaintiff's counsel and the child's parents were present, but no medical expert had been contacted, interviewed, or subpoenaed for trial.

The plaintiff's counsel presumably knew that the ordinary care and skill required of a doctor in the community in which he practices and proximate causation of the injury alleged must necessarily be established by expert testimony. *Huggins v. Hicken*, 6 Utah 2d 233, 310 P.2d 523 (1957); *Marsh v. Pemberton*, 10 Utah 2d 40, 347 P.2d 1108 (1959). In this case, the treatment of the infant's ailment and its relationship, if any, to the subsequent complication are not matters of common knowledge to laymen and do not evidence gross neglect or want of care and skill such as leaving medical sup-

plies in the incision of a patient and therefore, expert testimony of negligence and causation was essential to the plaintiff's case.

Without expert testimony, since the plaintiff could not introduce any competent evidence demonstrating negligence or the extent of the damages, if any, proximately resulting from the doctor's treatment, the only available alternative was to seek a continuance of the trial.

The trial court could have granted a trial continuance in accordance with Rule 40(b), Utah Rules of Civil Procedure, but it properly refused to do so. The rule states, in its relevant part:

Upon motion of a party, the court may in its discretion, and upon such terms as may be just . . . postpone a trial or proceeding upon good cause shown. *If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it.* (Emphasis added).

Since plaintiff's counsel had never contacted or interviewed Dr. Clark, he was unable to offer competent proof concerning the testimony he was expected to give. More importantly, however, he could not show that due diligence was used to procure Dr. Clark's testimony. No explanation exists for the failure to interview Dr. Clark or to notify him of the trial date or to subpoena him prior to trial or to secure his deposition.

Therefore, the trial court clearly did not abuse its discretion in denying the motion for a continuance of the trial date. The court could have allowed plaintiff an opportunity to proceed with the scheduled trial, but it correctly chose not to permit the needless waste of judicial time and energy in pursuit of a futile endeavor. Since the plaintiff could not prove a case in the absence of expert testimony, the plaintiff's counsel's argument on appeal that he was ready to proceed is wholly contrived and without merit.

When all relevant factors are considered, the record of this case not only supports, but clearly dictates a conclusion that the trial court properly dismissed the plaintiff's claim. The plaintiff was entitled to a reasonable opportunity for a hearing on the merits of the case, but it was the defendant that made every effort to allow the plaintiff that opportunity. The plaintiff had two years to investigate and substantiate the allegations asserted in the complaint and had nearly six months after knowledge of the trial date to prepare the case for presentation to the jury. Nevertheless, the record indicates that no action whatsoever was undertaken to prove a case and, as a result, the plaintiff was incapable of proceeding on the date of trial. In contrast, the defendant initiated each and every discovery and procedural step necessary to bring the case to trial and the defense was fully prepared to proceed to the jury. The court and the defendant did not deny the plaintiff a reasonable opportunity for a hearing on the merits. On the contrary, the plaintiff and plaintiff's counsel forfeited that right by their own neglect.

The cases plaintiff relies upon are, thus, wholly distinguishable from the facts relevant to this appeal. In *McKean v. Mountain View Memorial Estates, Inc.*, 17 Utah 2d 323, 411 P.2d 129 (1966), the Court reversed a default judgment entered by the court when the defendants' counsel arrived at trial 27 minutes late because he had been attempting to obtain a postponement of the trial by seeking a writ from the Supreme Court. Granting the defendants a new trial, the Court stated:

The purpose of a default judgment is to conclude litigation when a defendant fails to plead or otherwise defend an action. In such circumstances its use is practical and salutary. . . . This is not a case where the defendants had failed to defend. 411 P.2d at 130-31.

In *Bunting Tractor Co. Inc. v. Emmett D. Ford Contractors, Inc.*, 2 Utah 2d 275, 272 P.2d 191 (1954), the plaintiff failed to file a non-resident cost bond within one month after demand, but procured a bond before a motion to dismiss was filed. The Court reversed a dismissal with prejudice because the mere "deviation from form and procedure shall not work a forfeiture of substantive rights." 272 P.2d at 192. The dismissal of the plaintiff's case in the instant appeal was not based upon a mere technical default, but rather, was founded upon the complete and inexplicable failure of the plaintiff to fulfill the obligation of prosecuting an action with reasonable diligence.

The cases cited by the plaintiff in support of the contention that the court erred in refusing to allow the plaintiff an opportunity of proceeding on the date of

trial are wholly inapplicable because the trial court correctly determined that the plaintiff could not have proved a case without expert testimony. In light of that finding, the trial court clearly did not deny the plaintiff any opportunity that had not already been forfeited by neglect.

The propriety of the dismissal for failure to prosecute in this case is clearly illustrated by the closely analogous case of *Baker v. Sojka*, 74 N.M. 587, 396 P.2d 195 (1964). In *Baker*, the plaintiff sought a continuance on the grounds that the plaintiff was absent from the state due to illness and that an expert witness was on vacation and therefore unavailable. The trial court denied the motion and, since the defendant was ready for trial, the court dismissed the case for failure to prosecute. On appeal, the Supreme Court upheld the dismissal and observed no showing of any diligence as to why the expert witness had not been subpoenaed, why his deposition had not been taken prior to trial and, finally, found no evidence as to the facts to which the expert witness would testify. Affirming the dismissal, the Court stated:

Although plaintiff characterizes the action of the trial judge as "arbitrary and unprecedented," it would seem to us that the ruling made by the trial court resulted from the lack of diligence in the prosecution of the case by plaintiff. *Not only is there not a showing of any clear abuse of discretion, but, on the contrary, we believe the action of the trial court was a proper exercise of its judicial discretion.* 396 P.2d at 197. (Emphasis added).

In *Brasher Motor & Finance Co. v. Brown*, 23 Utah 2d 247, 461 P.2d 464 (1969), the Court affirmed a dismissal for failure to prosecute and, in so doing, cited *Baker* with approval. In *Brasher Motor*, the Court concluded as it should in this case:

We believe and hold that in the instant case the trial court did not abuse its discretion, but on the contrary acted with judicial propriety looking to the interests of all litigants and in promoting their causes with reasonable dispatch, — certainly in preventing indiscriminate jostling and clogging of the court calendars. 461 P.2d at 465.

CONCLUSION

The decision of the trial judge to dismiss the plaintiff's claim for failure to prosecute is eminently justified and wholly appropriate in light of the record and the intent of the rules of civil procedure. In order to protect the rights of all litigants to a resolution of their conflicts with reasonable dispatch, the Court must insist that a plaintiff prepare and prosecute his case with due diligence and care.

In the instant case, the trial judge exercised appropriate and sound discretion in determining that the plaintiff failed to fulfill the obligation owed to the court and to the parties of adequately prosecuting and preparing the case for final adjudication. The court below properly refused to condone the inexplicable and

total lack of initiative and care in prosecuting the claim against this defendant and correctly dismissed the case.

The Court should affirm the order of dismissal entered by the trial court.

Respectfully submitted,

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